IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

MONDAY, THE 26TH FEBRUARY 2007 / 7TH PHALGUNA 1928

CRL.A.No. 559 of 2003()

SC.91/2000 of ADDL.SESSIONS COURT (ADHOC), KASARAGOD

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APPELLANT: ACCUSED

P.SUDHAKARAN, AGED 48/99,
S/O.KANNAN, PANDIKANDAM, BEDAKAM.

BY ADV. SRI.V.N.ACHUTHA KURUP

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REP. BY PUBLIC
PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR, SRI THOMAS JOHN AMBOOKEN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M.JAMES, J.

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Crl.A No.559 of 2003

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Dated this the 26th day of February, 2007

J U D G M E N T

The accused in Sessions Case No.91/2000, on the file of Additional Sessions Judge (Ad hoc-I), Kasaragod, is the appellant. He was found guilty of the offence punishable under Section 55(a) of the Abkari Act, in short 'the Act'. Therefore, he was convicted and sentenced thereunder, to undergo rigorous imprisonment for three years and also to pay a fine of rupees one lakh, in default, to further undergo rigorous imprisonment for six months. Hence, this appeal.

2. The prosecution case is that on 18/07/1999 PW.2 and party, detected two litres of illicit arrack, from the possession of the appellant-accused, carried in MO.1 kannas. Therefore, he was proceeded against and final report filed, after completion of investigation.

3. The sessions case was posted for trial. It is submitted that, the counsel, who was representing the accused, relinquished vakalath, on 18/01/2003. Therefore, one

Sri.C.K.Sreedharan filed vakalath on behalf of the accused before the court below. Learned counsel for the appellant, Sri.V.N.Achutha Kurup submits that on 24/01/2003, when the case was taken up, Sri.C.K.Sreedharan was engaged at High Court, in connection with another case, in which he was representing and, therefore, his colleague had represented before the court for an adjournment of the matter. The learned Sessions Judge, observing that the police officers came from distant places and they ought to have been instructed not to appear, had an application for adjournment, was filed earlier. Therefore, the court proceeded with the examination of the witnesses present. PW.1, an independent attestor to Exhibit P1, seizure mahazar, and PW2, the detecting officer, who also investigated the case had been examined. There was no cross-examination. The application filed to recall the witnesses was dismissed. The records show that Crl.M.C.No.2150/2003, preferred before this Court, for a direction to the court below to allow the appellant to cross-examine PW.2. But it was dismissed. Therefore, the court below proceeded with the matter and disposed of the case as above.

4. The conviction of the appellant has been based on the version of PW.2 which remains uncorroborated. I fully agree with the principles contained in **Neelankandan Kunhu Raman vs. Public Prosecutor** [1960 KLT 704] that, even if an independent witness, who had been won over, or changes his attitude, or supports the defence version, will not affect the independent and trust-worthy evidence of the departmental witnesses. The fact remains in this case, unlike the Neelankandan Kunhu Raman's case, cited above, is that there was no cross-examination of the independent witnesses, only departmental witnesses were examined in this case. The other witnesses and the independent witnesses, though present in the court below at the time of trial, had not been examined.

5. I agree with the approach of the learned Sessions Judge that an application for adjournment must have been filed right on the day when a fresh vakalath has been filed by Sri.C.K.Sreedharan, immediately on 19/01/2003, as the trial was posted on 24/01/2003. Atleast, the court ought to have send stop memoranda to all the witnesses, thereby preventing them from travelling to the Sessions Court from distant places. That

had not been done. When the sessions court was ceased with the matter and the case was listed, it would cause hardships and difficulties for the Court in adjusting the work. Therefore, I cannot agree with the submission that the dismissal of the application is against the law.

6. The conviction of the appellant had now been made basing on the evidence of PW.2, the detecting officer of the case alone. There is no cross-examination. Such an approach in the criminal law would prejudice the interest of the accused. The trial must be fair and impartial. If the defence did not act with bona fide intentions, cost should have been levied from them, so as to compensate to the state or the witnesses who appeared from far away places. Fully realising the working conditions of the trial court and also its difficulties in adjusting the work without delay, the presiding officer must handle such situations with utmost calm, so as to avoid prejudice to the accused. Convicting a person to three years and fine of rupees one lakh and in default rigorous imprisonment for six months, cannot be mechanical in nature. But it should be only after affording an opportunity to defend himself, as enshrined in

Article 21 of the Constitution of India, giving sufficient time and facilities for preparing his defence. This view had been held from 1979 onwards by the Apex Court, under Article 21 of the Constitution of India. A person may be deprived of his liberty only according to the procedure established by law. Therefore, those who are called upon to deprive the personal liberty of others, in the discharge of what is conceived to be their duty, must strictly and scrupulously observe the forms and rules of the law. Therefore, when the counsel sought for time, although it disturbed the trial schedule of the sessions court, for the ends of justice, the trial court has to give time to the counsel to prepare the defence and cross-examine the witnesses to safeguard the life and liberty of a citizen of the country.

7. After considering the entire matter, I am of the opinion that an opportunity be given to the appellant-accused to cross-examine the witnesses and also the prosecution to continue with the examination of other witnesses, if found necessary. To enable the above, I set aside the impugned judgment, conviction and sentence, and remit the sessions case to the Additional Sessions Court (Ad hoc-I), Kasaragod.

8. The appellant shall appear before the court below on 27/03/2007. The learned Sessions Judge shall dispose of the matter, within two months from the date of appearance of the parties.

This appeal is allowed as above.

(J.M.JAMES)
Judge

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J.M.JAMES, J.

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Crl.A No.559 of 2003

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J U D G M E N T

26th February, 2007